Supreme Court, U.S.
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No. 00-1800

IN THE

Supreme Court of the United States

KIA P., individually and on behalf of MORA P., an infant, and MORA P.,

Petitioners,

v.

ROSEMARY McINTYRE, individually and as the Caseworker, Child Welfare Administration, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS LONG ISLAND COLLEGE HOSPITAL AND SUSAN MORANCE

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CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 29.6, Long Island College Hospital states that it is a Voluntary Corporation that is operated pursuant to Article 28 of the New York State Public Health Law, does not have any shares of stock which are publicly traded, and that no publicly held company owns ten (10) percent or more of Long Island College Hospital's stock.

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REASONS FOR DENYING THE WRIT

1. A 42 U.S.C. § 1983 claim does not lie against a private hospital or a private social worker when a hospital, through its medical staff, provides medical treatment, on a good faith basis, to an infant suspected of methadone withdrawal.

2. The United States District Court for the Eastern District of New York and the Second Circuit Court of Appeals properly decided that Petitioners' civil rights had not been violated and properly dismissed Petitioners' claims.

3. This Court's recent decision in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288 (2001) does not affect the Second Circuit's decision in this case as to when a private hospital will be determined to be a state actor.

OPINIONS BELOW

Both the United States District Court for the Eastern District of New York, which granted summary judgment to all defendants, and the United States Court of Appeals for the Second Circuit, which affirmed that decision, have found that the Respondents have no liability in this 42 U.S.C. § 1983 action.

STATEMENT OF THE CASE

Petitioners' Statement of the Case and Statement of Facts contain numerous misstatements and *omissions* of fact. Accordingly, Respondents offer the following as a complete and accurate account of the facts in this case.

STATEMENT OF THE FACTS

The synthesized facts of the underlying case are simple. Petitioner, Kia P., presented to Long Island College Hospital ("the Hospital") in labor with a full-term pregnancy. She had not received any pre-natal care at the Hospital and gave a history of being a prior crack-cocaine drug abuser and of having been diagnosed with syphilis, tuberculosis and HIV. According to the Hospital's written protocol regarding "Nursing Management of Infants at Risk for or Having Symptoms of Neonatal Drug Withdrawal", Petitioner met three of the criteria that necessitated a toxicology screen of the infant's urine to insure the infant's well-being. After delivery, the infant's urine was collected and sent to the Hospital's laboratory for an EMIT assay screening for illicit substances. The EMIT assay screening of the infant's urine was positive for methadone. Kia P. was questioned about her drug use during this pregnancy. She denied using methadone during the pregnancy. A Hospital social worker, Respondent, Susan Morance ("Ms. Morance"), informed Kia P. that she and the Hospital were required to report the case to the New York State Central Registry for Child Abuse.[1] Ms. Morance reported the case to the Central

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1. Ms. Morance's authority as a social worker derives from New York Social Services Law. Title VI, entitled "Child Protective Services," was enacted in 1973 to provide more effective protection to abused and maltreated children in New York State. One of its purposes was to

> encourage more complete reporting of suspected child abuse and maltreatment and to establish in each county of the state a child protective service capable of investigating such reports swiftly and competently and capable of providing protection for the child or children

(Cont'd)

Registry promptly and the physicians at the Hospital treated and observed the infant for signs and symptoms of methadone

(Cont'd)

> from further abuse or maltreatment and rehabilitative services for the child or children and parents involved.

N.Y. Soc. Serv. Law § 411.

The statute encourages, even requires, a wide variety of persons to report suspected child abuse. Section 413 permits some of the written reports from persons or officials to be admitted in evidence and authorizes various officials, including "a designated employee of a city or county department of social services," to take a child into protective custody without consent of the parent whenever continuing the child in the parents' custody presents an "imminent danger" to the child's health. N.Y. Soc. Serv. Law § 417(1).

The New York Child Protective Services Act provides a comprehensive statutory system and procedural framework for the reporting of suspected cases of child abuse. Section 413 of the Child Protective Services Act requires certain individuals, including physicians, nurses and any hospital personnel engaged in the admission, examination, care or treatment of persons, to report or cause a report to be made when they have "reasonable cause to suspect that a child coming before them in their professional or official capacity is an abused or maltreated child." Section 413 further provides:

> Whenever such person is required under this Title in his capacity as a member of the staff of a medical . . . institution . . . he shall immediately notify the person in charge of such institution, . . . who then also shall become responsible to report or cause reports to be made.

Thomas v. Beth Israel Hosp., 710 F. Supp. 935, 940 (S.D.N.Y. 1989).

Section 420 of the Child Protective Services Act makes the failure to report a case of suspected child abuse a criminal offense, a Class A misdemeanor, punishable in New York State by up to one year in prison, and subjects individuals who willfully fail to make such reports to civil liability for the damages proximately caused by such failure.

withdrawal. Methadone withdrawal is a serious medical condition and is potentially fatal to infants. The infant displayed signs of irritability and tremors, both of which are symptoms of methadone withdrawal. Pet. App. at B4 and D3. The infant was treated with supportive care. Based upon Kia P.'s denial of methadone use during this pregnancy, the infant's urine was forwarded to an outside laboratory for confirmatory testing. The first laboratory could not test the infant's urine because the sample was too small. Therefore, the urine sample was forwarded by the first laboratory to another laboratory for microscopic testing.

The first laboratory's inability to conduct the required testing caused a delay that was not due to any fault of the Hospital. The microscopic testing could not detect a presence of methadone. Once the confirmatory test results were received by the Hospital, on April 7, 1993, Hospital laboratory personnel reported those results to the infant's physicians. Based upon the results and the lack of further withdrawal symptoms, the physicians transferred the infant from a medical observation status to "ALC" (Alternate Level of Care), which indicated that there was no longer any medical need for the infant to remain in the Hospital. On April 7, 1993, Ms. Morance also reported the test results to CWA. Within one day, the Child Welfare Administration, Ms. McIntyre and Ms. Delamothe (the "City Respondents") made a determination that they were not going to take any action against Kia P. and communicated this information to the Hospital through Ms. Morance on April 8, 1993. The infant was released from the Hospital that same day at 11:20 a.m. Based upon these occurrences, Petitioners brought this action against the Hospital, Ms. Morance and the City Respondents.

Petitioners claim that Mora was on a "social hold" from the time of her birth. There has been no evidence to support this claim. At the conclusion of discovery all witnesses had testified that Mora was on a "medical" hold, being medically treated, due to her methadone withdrawal. Petitioners brazenly claim that the EMIT assay was false. This is also not true. The presence of methadone could not be confirmed in the infant's urine seven days after it was initially collected, but the microscopic testing via gas chromotography/mass spectometry (gc/ms) did not test for the presence of methadone metabolites. All the gc/ms testing showed was that, seven days post collection, the presence of methadone could not be confirmed. Petitioners also claim that the EMIT screening test used by the Hospital is "frequently inaccurate." There has been no evidence, other than Petitioner's own expert witness's statement, that the EMIT assay used for the routine screening of the infant's urine for illicit drugs is at all inaccurate. Moreover, Petitioners state that the drug Phenergan cross-reacts as methadone for the EMIT assay. However, they fail to mention that the Phenergan would have to be given in extremely high doses and that such high doses were not administered to Kia P. Petitioners also allege that Kia was limited in her visits with Mora for the purpose of feeding her. The District Court found that "it is uncontested that while Mora remained in the Hospital, Kia was permitted to, and did, visit Mora, including during feeding times." Pet. App. at D4. Petitioners attempt to enlist this Court's sympathy by claiming they were caused to suffer an "indignity" when submitting to drug testing by CWA. However, the District Court and the Second Circuit Court found that Kia and her husband "voluntarily submitted to drug tests". Pet. App. at B5.

Petitioners' statement of the facts egregiously fails to acknowledge that the infant showed signs and symptoms of methadone withdrawal, tremors and irritability. The Second Circuit noted the District Court's finding that "there is undisputed evidence in the record that an infant's methadone withdrawal can take a minimum of one week to manifest itself. Hospital records indicate that Mora exhibited tremors and irritability, which are symptoms consistent with methadone withdrawal." Pet. App. at B4. Petitioners omit the fact that the infant was being medically observed during her entire admission for potentially fatal seizures due to methadone withdrawal. Pet. App. at B4.

Petitioners have offered no evidence in admissible form supporting their allegations that the Respondents violated any of Petitioners' constitutionally protected rights. As Petitioners' false accusations are wholly unsupported by the record, their petition for a writ of certiorari should be denied.

RESPONDENTS' ARGUMENT

A. There Is No "Split" Among The Circuits On The Issues Presented In This Case.

Petitioners have misconstrued this Court's holding in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001). In an effort to obtain certiorari review, Petitioners contend that:

> 1. The Second Circuit's decision has created a split in the Circuits on the question of whether there is state action when a private hospital detains a minor for child protective reasons.

Pet. Brief at 15.

Petitioners ignore the multitude of decisions from this Court and all Circuit Courts which hold that there is no bright line for determining who is and who is not a state actor because each case is fact specific. *Evans v. Newton*, 382 U.S. 296 (1966); *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); *Community Med. Center v. Emergency Medical Svcs., Inc.*, 712 F.2d 878 (3d Cir. 1983); *Mentavlos v. Anderson*, 249 F.3d 301 (4th Cir. 2001); *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337 (4th Cir. 2000); *Frazier v. Board of Trustees*, 765 F.2d 1278 (5th Cir. 1985); *Bass v. Parkwood Hosp.*, 180 F.3d 234 (5th Cir. 1999); *Howerton v. Gabica*, 708 F.2d 380 (9th Cir. 1983). "This Court has never attempted the 'impossible task' of formulating an infallible test for determining whether the State ('in any of its manifestations') has become significantly involved in private discriminations." *Reitman v. Mulkey*, 387 U.S. 369, 378 (1967). The *Brentwood* court stated:

> What is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity. From the range of circumstances that could point toward the State behind an individual face, no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government. *See Tarkanian*, 488 U.S. at 193, 196; *Polk County v. Dodson*, 454 U.S. 312, 70 L. Ed. 2d 509, 102 S. Ct. 445 (1981).

Brentwood, supra at __, 121 S. Ct. at 930.

Because a single standard test is not practical or possible, this Court has adopted a number of approaches depending on the circumstances, and has counseled lower courts to carefully investigate the facts of each case. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

This Court's decision in *Brentwood* is consistent with its previous holdings in cases regarding state actors. There has been no major revision or addition to the tests based upon the holdings of *Brentwood*. Moreover, the Second Circuit's decision in the instant case is entirely consistent with those holdings. The *Brentwood* case is quite simple and straightforward. There, the Tennessee Secondary School Athletic Association (TSSAA) was incorporated to regulate interscholastic athletic competition among public and private secondary schools in Tennessee. *Id.* at __, 121 S. Ct. at 927. The TSSAA had historically been seen to regulate *in lieu* of the State Board of Education's exercise of its own authority. In fact, the State Board of Education for Tennessee, in 1972, expressly "designated" the TSSAA as the organization to supervise and regulate the athletic activities in which the public junior and senior high schools in Tennessee participate on an interscholastic basis. *Id.* at __, 121 S. Ct. at 928. Prior to this delegation of duty, supervision and regulation of junior and senior high school athletic activities had been a state function, as part and parcel of providing an education to the children of Tennessee. Once the State Board of Education in Tennessee cloaked the TSSAA with the authority to organize and supervise the athletic component of Tennessee's responsibility to educate its children, TSSAA became a state actor subject to Fourteenth Amendment scrutiny.

In this case, the State did not delegate any responsibilities to the Hospital for the care and treatment of this infant.

The Hospital was a private actor, privately treating this infant and her mother who put themselves in the care of the Hospital's physicians and nurses when Kia P. presented to the Hospital for the delivery of Mora. The State, through CWA or any other source was never involved, even peripherally, in any of the medical treatment decisions made by the Hospital's physicians.

This Court in *Brentwood*, *supra*, and a plethora of related cases, has held that

> "[t]he judicial obligation is not only to preserve an area of individual freedom by limiting the reach of federal law and avoid the imposition of responsibility on a State for conduct it could not control," *Tarkanian*, *supra*, at 191 (quoting *Lugar*, *supra*, at 936-937), but also to assure that constitutional standards are invoked "when it can be said that the State is responsible for the specific conduct of which the plaintiff complains." *Blum*, *supra*, at 1004.

The test this Court adopted is the test commonly used in one form or another throughout all the Circuit Courts and was the test used by the Second Circuit in the decision that is before this Court for review. This test is the *close nexus* test. Specifically, this Court has stated that "state action may be found if, *though only if*, there is such a 'close nexus between the State and the challenged action' " that seemingly private behavior "may be fairly treated as that of the State itself." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974) (emphasis added).

There is abundant authority for the Second Circuit's decision that the Hospital was not a state actor while providing medical care to Mora. *See Jensen v. Lane County*, 222 F.3d 570 (9th Cir. 2000). In making a determination of whether a

private party is a state actor for Fourteenth Amendment purposes, analyzing *Brentwood* together with all the preceding cases, this Court has taken a flexible approach to the state action doctrine, applying a variety of tests to the facts of each case. *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1447 (10th Cir. 1995). Those tests used to determine state action include the close nexus, symbiotic relationship, joint action and public function tests. Each of the eleven United States Circuit Courts of Appeal has also applied these tests completely consistent with the recent *Brentwood* decision. Based upon any of these tests Petitioners can not show that the Hospital was a state actor when it medically treated Mora for methadone withdrawal. Further, Petitioners can not show that Ms. Morance was a State actor when she carried out her duties as a hospital employed social worker.

The Close Nexus Test

First, under the *close nexus* test, "a plaintiff must demonstrate that there is a sufficiently close nexus between the government and the challenged conduct such that the conduct may be fairly treated as that of the State itself." *Jackson*, 419 U.S. at 351. *See also Lugar*, 457 U.S. at 936; *Collyer v. Darling*, 98 F.3d 211 (6th Cir. 1996); *Jensen, supra.*

A "state official's mere approval of or acquiescence to the conduct of a private party is insufficient to establish the nexus required for state action." *See Gallagher, supra*, at 1450. The close nexus — state action determination requires an examination of all the relevant circumstances, in an attempt to evaluate the degree of the Government's participation in the private party's activities. *Skinner, supra*. Whether a private party should be deemed an agent or instrument of the Government for Fourteenth Amendment purposes necessarily turns on the

degree of the Government's participation in the private party's activities, a question that can only be resolved in light of all the circumstances. *Evans v. Newton*, 382 U.S. 296 (1966). Only by sifting facts and weighing circumstances can the court determine whether the reach of the Fourteenth Amendment extends to a particular case. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). There is no specific formula for determining state action. *Hicks v. Southern Maryland Health Systems Agency*, 737 F.2d 399, 402 n.3 (4th Cir. 1984) (quoting *Howerton v. Gabica*, 708 F.2d 380, 383 (9th Cir. 1983)); *see also Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *Bass v. Parkwood Hosp.*, 180 F.3d 234 (5th Cir. 1999); *Patrick v. Floyd Med. Center*, 201 F.3d 1313 (11th Cir. 2000).

The Symbiotic Test

The second test is the *symbiotic relationship* test. A symbiotic relationship constitutes state action if the State "has so far insinuated itself into a position of interdependence [with a private party that] it must be recognized as a joint participant in the challenged activity." *Burton*, 365 U.S. at 725 (1961).

The Willful Participant Test

Third, state action can be present if a private party is a "willful participant in joint action with the State or its agents." *Dennis v. Sparks*, 449 U.S. 24, 27 (1980). As with the other tests, "the mere acquiescence of a State official in the actions of a private party is not sufficient." *Flagg Bros. v. Brooks*, 436 U.S. 149, 164 (1978). "Constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains." *Blum, supra*, at 1004 (1982).

This Court in *Blum* also applied the close nexus test. And after finding that the actions of a private nursing home could not be fairly attributed to the State, this Court looked at a second part of the nexus test. This Court specifically noted that the

> "factual setting of each case will be significant", [but the] precedents indicate that a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.

Id. at 1004. To prove a conspiracy between private parties and the state under section 1983, the plaintiff must show a joint participation, agreement, or meeting of the minds to violate constitutional rights. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). And, there must be sufficient evidence of a conspiracy to prevent the jury from engaging in sheer speculation and conjecture. *See Brokaw v. Mercer County*, 235 F.3d 1000 (7th Cir. 2000); *Sigmon v. CommunityCare HMO, Inc.*, 234 F.3d 1121 (10th Cir. 2000); *Scott v. Hern*, 216 F.3d 897 (10th Cir. 2000); *Bendiburg v. Dempsey*, 909 F.2d 463 (11th Cir. 1990), *cert. denied*, 500 U.S. 932 (1991).

The Public Function Test

Finally, the *public function* test is narrow and difficult to satisfy. A private party is a state actor if the state delegates to it a "function traditionally exclusively reserved to the State." *Jackson, supra*, at 352. *See also Rockwell v. Cape Cod Hosp.*, 26 F.3d 254 (1st Cir. 1994); *Goldstein, supra*; *Payton v. Rush-Presbyterian-St. Luke's Medical Center*,

184 F.3d 623 (7th Cir. 1999). This Court has found only a few areas, including the administration of elections of public officials, to be public functions.

Applying any one of these four tests, especially the entwinement or joint action test, which Petitioners assert is their strongest argument, Petitioners fail to demonstrate sufficient evidence of state action against the Hospital or Ms. Morance.

Therefore, Petitioners are left with the argument that the Hospital, separate and apart from medical judgments can be determined to be a state actor thereby subjecting the Hospital to liability under section 1983. This argument fails as well based upon the lack of proximate cause. Petitioner has asserted this second theory that "concurrent with the medical care rendered to Mora, the Hospital's Administration was acting in another capacity to detain Mora." This fictitious allegation is without record support and without proof of a direct and proximate cause, Petitioners' allegations must fall. Petitioners claim that the infant was held by the Hospital for two concurrent reasons. The first, for which liability under § 1983 cannot attach, was that in the judgment of the Hospital doctors, medical observation and treatment of this infant was mandated. Second, the Hospital had a written policy requiring admission of suspected victims of child abuse until the New York State Family Court determined whether to remove that child into State custody. There is no evidence in this case, other than the mere existence of the written policy, that Mora was held pursuant to that policy or for any reason other than the physicians' concern that she was suffering from methadone withdrawal. Mere allegations are not enough to establish a causal connection between the reason for the

hold and the hold itself. "A section 1983 action, like its state tort analogs, employs the principle of proximate causation." *Townes v. City of New York*, 176 F.3d 138, 146 (2d Cir. 1999). "As in all section 1983 cases, the plaintiff must prove that the defendant's action was a proximate cause of the plaintiff's injury." *Gierlinger v. Gleason*, 160 F.3d 858, 872 (2d Cir. 1998). Although proximate causation in the section 1983 context is a question of federal law, in determining the meaning of the concept, courts look to those state tort analogs, because this Court has made it crystal clear that principles of causation borrowed from tort law are relevant to civil rights actions brought under section 1983. *Warner v. Orange County Dep't of Probation*, 115 F.3d 1068 (2d Cir. 1997).

This Court, in *Malley v. Briggs*, 475 U.S. 335 (1986) endorsed the rule that courts "should read [section 1983] against the background of tort liability that makes a man responsible for the natural consequences of his actions". *Id.* at 344-45 n.7. However, part of this tort background is the concept of the "but for" test. A plaintiff must allege factual causation — *i.e.*, "but for" causation — in order to state a claim under section 1983. *Scott, supra*. In *Scott*, plaintiff brought an action under section 1983 against individuals who participated in his involuntary commitment to a mental institution. One of the defendants, Police Officer Idler, had written and submitted a report regarding Scott's mental condition. Plaintiff alleged that it was this report together with the co-defendant's, Dr. Hern, examination that was the "direct and proximate" cause of the deprivation of his constitutional rights. However, the Tenth Circuit found otherwise and stated that these facts were bald allegations. The Tenth Circuit found that

> even assuming that Idler included false statements in his report and then gave that report to Hern knowing it would be used to seek Scott's involuntary commitment, it is simply not the case that, "but for" Idler's preparation and provision of the report, Scott would not have been committed . . . And even if Idler's report was sufficient in itself to support Scott's commitment, it was not a substantial factor because it was insignificant in relation to the other facts set forth in [Hern's] affidavit.

Id. at 911. Similarly, in *Monell v. New York City Dept. of Social Svcs.*, 436 U.S. 658 (1978) this Court held that official policy must be the "moving force of the constitutional violation" in order to establish the liability of a government body under section 1983. *Id.* at 694.

These cases are similar to the situation of the two alleged factors upon which Petitioners base Mora's detention in the Hospital. All of the evidence has proven that the only factor upon which Mora was held in the Hospital for the first 8-9 days was the medical judgment of the physicians that Mora was suffering from methadone withdrawal. There has been no testimony to the contrary and both courts below concurred that Mora was held on a medical basis while she was being treated and observed for methadone withdrawal. Therefore, Petitioners' bald allegations that Mora was held pursuant to a written policy can not withstand the "but for" test. As Mora was not held by the Hospital pursuant to the Administrative Policy, nor was she held by any act fairly attributable to, or entwined with, the State and the Hospital through its administrators or physicians are not entwined with the State so as to satisfy the test recently enunciated in *Brentwood*, the Second Circuit's decision was entirely consistent with *Brentwood*.

B. Contrary to Petitioners' Contention, There Was No Due Process Deprivation Here and There is No Significant "Split" Among the Circuit Courts on the Due Process Issue in the Child Welfare Context.

Both courts below, in viewing the facts and resolving all ambiguities in favor of Petitioners, correctly held that Petitioners were not deprived of due process.

Respondents fully agree with Petitioners that the parent-child relationship is a fundamental liberty interest and one that is deserving of the greatest sanctity. Of that there is no dispute. However, Petitioners fail to note that this principle is not without qualification. As the Federal courts have observed, "[t]hese substantial private interests are not without public counterpart in the context of protective custody by the State." *Jordan v. Jackson*, 15 F.3d 333, 346 (4th Cir. 1994). Indeed, this Court has stated that "a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." *Parham v. J.R.*, 442 U.S. 584, 603 (1979).

Contrary to the record below and the Second Circuit's findings, Petitioners stubbornly contend that the "deprivation" here lasted significantly longer than one day. Petitioners, fully aware that the Federal courts have routinely found no due process violation in similar situations, are forced to maneuver around the indisputable facts herein in an attempt to enlarge the arguable period of deprivation from one day to a week or more. Petitioners have failed in this regard.

The Second Circuit, in reviewing the District Court's granting of summary judgment *de novo*, construed the evidence in the light most favorable to Petitioners and found there to be:

> [I]nsufficient evidence in the record to support a finding that the Hospital's decision to hold Mora until she was medically cleared was made for CWA-related purposes . . . Mora would have been released to her mother at her mother's insistence despite Hospital's doctors' concerns that Mora might be suffering from life-threatening methadone withdrawal. Such evidence does not establish state action by the hospital in retaining Mora pending her medical release.

Pet. App. at B12.

Thus, in reviewing the record most favorable to Petitioner, the Second Circuit concluded that:

> [T]he Hospital did not hold Mora in its capacity as a state actor *until after* the primary evidence of abuse had been discredited, when the drug test indicated the absence of methadone in Mora's urine and she was medically cleared for release.

Pet. App. at B17 (emphasis supplied). Accordingly, for the Second Circuit, the due process clock began ticking once the child was medically cleared as that was when the infant's hospitalization transformed legally from "non-state action" to "state action."

1. Substantive Due Process

Analysis of the due process liberty interest involves evaluation of both substantive and procedural safeguards. *Van Emrik v. Chemung Co. Dep't of Social Svcs.*, 911 F.2d 866 (2d Cir. 1990).

Inherent in the analysis of substantive due process is a balancing of the two competing interests discussed above, *i.e.*, the sanctity of the parent-child relationship with the state's compelling interest to protect the child's health and safety, even if that involves protecting the child from his or her own parents. *See Wilkinson v. Russell*, 182 F.3d 89 (2d Cir. 1999); *Croft v. Westmoreland Co. Child and Youth Svcs.*, 103 F.3d 1123 (3d Cir. 1997).

This Court has stated that, " 'due process' has never been, and perhaps never can be, precisely defined." *Lassiter v. Department of Soc. Svcs.*, 452 U.S. 18 (1981). In a similar context, this Court has ruled that "only the most egregious official conduct can be said to be arbitrary in the constitutional sense." *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). Indeed, to establish liability, it must be shown that the executive action "shocks the conscience." *Id.* Mere negligence will not suffice. *Id.* at 848-49. As one court has observed, for liability to attach to a social worker in the custody context, the standard of culpability "must exceed both negligence and deliberate indifference, and reach a level of gross negligence or arbitrariness that indeed 'shocks the conscience'." *Miller v. City of Philadelphia*, 174 F.3d 368 (3d Cir. 1999) (holding no violation of substantive due process when social worker "reasonably believed" the children were in danger of abuse). *See also Weller v. Dep't of Social Svcs.*, 901 F.2d 387 (4th Cir. 1990); *Patterson v. Armstrong Co. Children and Youth Svcs.*, 2001 U.S. Dist. Lexis 6996 (W.D. Pa. 2001).

Given the constant friction between the competing interests in the child abuse investigation arena, the Second Circuit herein held that such an investigation will be deemed constitutional "provided simply that case workers have a

reasonable basis for their findings of abuse." Pet. App. at B17. *See also Brokaw v. Mercer County*, 235 F.3d 1000 (7th Cir. 2000); *Miller, supra.*

Employing that standard here and analyzing the applicable time period for alleged due process deprivation ("a day or two in this case" Pet. App. at B17.), the Second Circuit held that this was a reasonable period of time for the CWA to process the information, review the case, decide whether to authorize release, and communicate their decision to the Hospital. Pet. App. at B17-18. Accordingly, the Second Circuit held that with respect to the Hospital:

> The Hospital's holding of Mora pending the outcome of this deliberative process is a reasonable accommodation of the state's compelling interest in protecting children from abuse and neglect.

Pet. App. at B18.

Even in *Bendiburg, supra*, a case relied upon by Petitioner to demonstrate a claimed schism in the circuits, the Eleventh Circuit found no substantive due process violation and stated that, "circumvention of parental authority for a *five-day period* did not rise to a level sufficiently egregious or shocking to sustain a substantive due process claim with respect to severance of the parent-child relationship." 909 F.2d at 468 (emphasis supplied).

2. Procedural Due Process

Under Petitioners' procedural due process claim they allege they were entitled to either or both of a pre-deprivation hearing and/or a post-deprivation hearing.

No pre-deprivation hearing was required here given that the infant was admitted to the hospital upon her birth and was monitored and treated over the ensuing days due to suspected methadone withdrawal. Even in a routine situation where no such abuse is suspected, a newborn child is admitted to the hospital for several days following birth for routine medical monitoring of both mother and child. In the face of suspected medical complications, that period may become extended in order to permit the medical staff to make the appropriate diagnosis and render the appropriate treatment. Petitioners certainly do not suggest that any patient admitted to a hospital, either infant or adult, is entitled to a pre-deprivation hearing while the medical staff is in the process of evaluating and treating a patient. Moreover, as the District Court noted, it is "uncontested that while Mora remained in the Hospital, Kia P. was permitted to, and did, visit Mora, including feeding times." Pet. App. at D4. That Kia P. was permitted unfettered daily access to her daughter throughout the hospitalization was a factual finding in the courts below.

As this Court has recognized that "due process is flexible and calls for such procedural protections as the particular situations demands," *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), it is abundantly clear in the case at bar that it was neither necessary nor feasible for a prior hearing to be held. The infant was born in the hospital, was thought to have a serious medical condition, demonstrated known symptoms of that condition, was treated for that condition, and said condition was not medically resolved for several days. Hence, there was no indication or opportunity for a prior hearing. Once the medical evaluation was concluded, the infant remained in the hospital for a very brief period while the CWA determined no investigation would be

commenced and communicated their decision to the hospital. By the next morning, the infant was discharged home. As such, a pre-deprivation hearing was not possible.

As for the post-deprivation hearing, that argument becomes moot given that Kia P. discharged the infant from the hospital roughly one day following the cessation of the medical work-up for methadone withdrawal. The methadone evaluation was deemed complete as of April 6 or 7 and Kia P. signed her daughter out of the Hospital on April 8 at 11:20 a.m.[2] In fact, other courts that have addressed this issue in a similar context have upheld periods of deprivation that exceed the time period herein. *See, e.g., County of Riverside*, 500 U.S. 44 (1991); *Miller*, *supra*; *Jordan*, *supra*; *Patterson*, *supra*.

As the Second Circuit correctly held, the time period encompassing any conceivable "deprivation" here was minimal and was reasonable under the circumstances. Pet. App. at B21-22. While Petitioners paint a picture of a "split" throughout the Circuits on this issue, a reading of similar cases finds that contention to be off the mark. To the contrary, the Federal courts have held that deprivations that last brief periods of time, typically several days, until a hearing is held, are not violative of due process. *See, e.g., Jordan, supra* (holding that no hearing until 65 hours after the removal was constitutional); *Patterson*, *supra* (stating that seventy-two hours is the "outside tolerance of the Fourteenth Amendment"); *Cecere v. City of New York*,

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2. Indeed, it would seem overly generous to characterize this one day time period as a "deprivation" since once the lab results were received by the hospital and analyzed by the physicians on April 7, it was then determined that further medical observation was no longer necessary, and the wheels were set in motion to discharge the infant, which was accomplished *the following morning*.

967 F.2d 826 (2d Cir. 1992) (holding that a "deprivation" of four days was not violative of due process) Here, no post-deprivation hearing was ultimately necessary given that the Hospital discharged the infant within one to two days following the starting point of any arguable "deprivation" and that period of time was within the "prompt" time period that the Circuit Courts will tolerate in such situations. As this Court has observed, "the significance of such a delay cannot be evaluated in a vacuum." *F.D.I.C. v. Mallen*, 486 U.S. 230, 242 (1988).

Implicitly adopting the inherent rule of flexibility that must be considered in due process cases, the Second Circuit noted that the instant case is not the typical scenario in that the infant was already hospitalized when the alleged deprivation began. She was not forcibly removed from her mother, but rather was voluntarily placed in the hospital by virtue of her birth there. The Second Circuit then addressed whether a "prompt" post-deprivation hearing was held. Pet. App. at B20. In defining "prompt", the court noted that it had previously tolerated a four-day delay (*see Cecere, supra*), and held that the one to two days in the instant case was within the acceptable "breathing room" that the law provides child welfare officials to make decisions. Pet. App. at B22-22.

As illustrated by the aforementioned cases, the one to two days at issue herein is well within the outside parameters that have been established by the other circuits. Given the factual idiosyncrasies of child abuse cases, coupled with the inability to precisely define "due process", it is evident that the lower courts must be permitted flexibility to address each case individually. While Petitioners point to a "split" among the lower courts, Petitioners can point this Court to no credible evidence of the same.

CONCLUSION

For all of the foregoing reasons, Respondents Long Island College Hospital and Susan Morance respectfully request that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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